

CALIFORNIA COASTAL COMMISSION

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STAFF REPORT AND RECOMMENDATION ON APPEAL

LOCAL GOVERNMENT: City of San Diego

DECISION: Approved with Conditions

APPEAL NO.: A-6-PCB-04-016

APPLICANT: Michael Turk/M.B. Ocean Front Properties

PROJECT DESCRIPTION: Demolition of existing 24-unit motel and two single-family residences and construction of a mixed-use development consisting of 17 residential dwelling units (condominiums) totaling 39,137 sq.ft. and four retail/commercial leaseholds totaling 2,891 sq.ft. on an approximately .5 acre site.

PROJECT LOCATION: 4666 Mission Boulevard, Pacific Beach, San Diego, San Diego County. APN 415-581-01, -02, -03

APPELLANTS: Coastal Commissioners Patrick Kruer and Toni Iseman

SUMMARY OF STAFF RECOMMENDATION:

The staff recommends that the Commission, after public hearing, determine that substantial issue exists with respect to the grounds on which the appeal has been filed.

SUBSTANTIVE FILE DOCUMENTS: Certified Pacific Beach Community Plan and Local Coastal Land Use Plan; Certified City of San Diego Implementation Plan (Land Development Code); and Appeal Forms.

Appellants Contend That: The subject proposal results in the construction of a mixed-use project including a mixed-use structure (retail/commercial on the ground floor and residential use on the second and third levels) along Mission Boulevard and a second residential structure to the west of this structure on the portion of the site that is currently zoned C-V-1-2 (CV = Commercial Visitor-Serving). The proposed second structure, (Building No. 3) located entirely within the portion of the site that is zoned C-V-1-2, is

proposed to contain residential use only (four units). Given that the certified LCP does not permit residential uses on the ground floor within the C-V-1-2 zone, the development is inconsistent with the certified LCP.

In addition, the proposed development results in the removal of a 24-unit motel which could impact the supply of existing lower-cost visitor-serving accommodations in the nearshore area. Hotels and motels represent high-priority tourist facilities. The City did not conduct any studies with regard to the existing reservoir of visitor-serving hotel/motel accommodations in the nearshore community including supply vs. demand, etc. or make any findings on this issue.

Local Government Action. The coastal development permit was approved by the Planning Commission on January 15, 2004. The conditions of approval address, in part, the following: landscaping, off-street parking, building height, restriction of the four mixed-use units fronting on Mission Boulevard to commercial/retail use only; and water quality.

Appeal Procedures.

After certification of a municipality's Local Coastal Program (LCP), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permit applications. One example is that the approval of projects within cities and counties may be appealed if the projects are located within mapped appealable areas. The grounds for such an appeal are limited to the assertion that "development does not conform to the standards set forth in the certified local coastal program or the [Coastal Act] public access policies." Cal. Pub. Res. Code § 30603(b)(1). Where the project is located between the sea and the first public road paralleling the sea or within 300 ft. of the mean high tide line, the grounds of appeal are limited to those contained in Section 30603(b)(1) of the Coastal Act.

After the local government has taken final action on an appealable project, it must send a notice of that final action (NOFA) to the Commission. Cal. Pub. Res. Code § 30603(d); 14 C.C.R. § 13571. Upon proper receipt of a valid NOFA, the Commission establishes an appeal period, which runs for 10 working days. Cal. Pub. Res. Code § 30603(c); 14 C.C.R. § 13110 and 13111(b). If an appeal is filed during the appeal period, the Commission must "notify the local government and the applicant that the effective date of the local government action has been suspended," 14 C.C.R. § 13572, and it must set the appeal for a hearing no later than 49 days after the date on which the appeal was filed. Cal. Pub. Res. Code § 30621(a).

Section 30625(b)(2) of the Coastal Act requires the Commission to hear an appeal of the sort involved here unless the Commission determines that no substantial issue is raised by the appeal. If the staff recommends "substantial issue" and no Commissioner objects, the Commission will proceed directly to a de novo hearing on the merits of the project.

If the staff recommends “no substantial issue” or the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have 3 minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised. If a substantial issue is found, the Commission will proceed to a full public hearing on the merits of the project either immediately or at a subsequent meeting. If the Commission conducts a de novo hearing on the permit application, the applicable test for the Commission to consider is whether the proposed development is in conformity with the certified Local Coastal Program.

In addition, for projects located between the sea and the first public road paralleling the sea, Sec. 30604(c) of the Coastal Act requires that, for a permit to be granted, a finding must be made by the approving agency, whether the local government or the Coastal Commission on appeal, that the development is in conformity with the public access and public recreation policies of Chapter 3 of the Coastal Act.

The only persons qualified to testify before the Commission at the “substantial issue” stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. At the time of the de novo hearing, any person may testify.

Staff Note: Legal counsel for the applicant submitted a letter on March 22, 2004 (“Letter”), attached hereto as Exhibit #7, arguing that this appeal should be withdrawn for the following reasons: (1) “the appeal was not filed in a timely fashion,” (2) the Notification of Appeal issued by Commission staff was “defective on its face,” and (3) the development “is not located between the sea and the first public road, and it does not appear that the portion of the property that is subject to the appeal is within 300 feet of the inland extend of any beach nor is it within 300 feet of the seaward face of any coastal bluff.” None of these claims is true.

Regarding the first claim, the Letter states that the Commission received the NOFA on February 18, 2004 and that the appeal was filed on March 3, 2004. Although the Letter states that the filing of the appeal was 11 days after receipt of the NOFA, March 3, 2004 was the tenth working day after February 18, 2004. As in all cases of computation of time under California law, the “time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded.” Cal. Gov’t Code § 6800. Moreover, the Commission’s regulations specify that the deadline is the tenth working day “after receipt of the NOFA.” 14 C.C.R. § 13111(b).

Regarding the second claim, the Letter states that the Notification of Appeal was defective because it stated that the matter was appealed pursuant to Public Resources Code sections 30602 or 30625, neither of which applies where there is a certified Local Coastal Program (LCP). This statement is inaccurate. Section 30625 does apply, and

this appeal was filed pursuant to that section, among others. See Cal. Pub. Res. Code § 30625(a) (“any appealable action on a coastal development permit ... by a local government ... may be appealed to the commission by ... any two members of the commission”). Moreover, even if the citations in the Notification of Appeal were wrong, that would not render the notice defective. As indicated above, the Commission’s regulations only require the Commission to notify the local government “that the effective date of the local government action has been suspended.” 14 C.C.R. § 13572. Finally, even if some technical flaw in the notice somehow made it defective, which it was not, the Letter does not explain how that would render the appeal invalid.

Draft Post-Certification Maps

Finally, regarding the third claim, the applicant also contends that the Commission made an error of law because it failed to follow the appeal jurisdiction boundary in the “[Draft] Post-Certification Appellate Jurisdiction Map” prepared by the Commission for the City of San Diego. In particular, the applicant states that the Commission “abandoned the jurisdictional limits set forth in the Post-Cert Map” when it determined Mission Boulevard to be the first public road. The applicant further contends that before the Commission could use Mission Boulevard as the first public road paralleling the sea, it would have to consult with the City of San Diego, provide notice to the public, and adopt a formal resolution and findings of fact. The Commission finds that no error of fact or law has occurred in this regard.

The Coastal Act provides that development proposed to be located in the geographic areas identified in Section 30603 is appealable to the Commission. One of the geographic areas identified in Section 30603 is the area between the sea and the first public road paralleling the sea. Section 13577(i) of the California Code of Regulations defines the first public road paralleling the sea. It states:

(i) First Public Road Paralleling the Sea.

(1) The “first public road paralleling the sea” means that road nearest to the sea, as defined in Public Resources Code Section 30115, which:

(A) is lawfully open to uninterrupted public use and is suitable for such use;

(B) is publicly maintained;

(C) is an improved, all-weather road open to motor vehicle traffic in at least one direction;

(D) is not subject to any restrictions on use by the public except when closed due to an emergency or when closed temporarily for military purposes; and

(E) does in fact connect with other public roads providing a continuous access system, and generally parallels and follows the shoreline of the sea so as to include all portions of the sea where the physical features such as bays, lagoons, estuaries, and wetlands cause the waters of the sea to extend landward of the generally continuous coastline.

When based on a road designated pursuant to this section, the precise boundary of the permit and appeal jurisdiction shall be located along the inland right-of-way of such road.

In this case, Mission Boulevard meets the criteria for the first public road as set forth in the above regulation, including the criteria of subsection (E) above because it “generally parallels and follows the shoreline of the sea”, including the physical features of the sea which “cause the waters of the sea to extend landward of the generally continuous coastline” and it “connects to other public roads providing a continuous access system”. The staff in the Commission’s technical services division have confirmed that Mission Boulevard constitutes the first public road paralleling the sea under the above criteria.

The Commission’s regulations at Section 13576(a), also require that the Commission adopt maps to illustrate the geographic areas identified in section 30603. These maps are referred to as “post-certification” maps. The Commission has not adopted a post-certification map for the City of San Diego. The Commission’s technical services staff have previously prepared a draft of a post-certification map, but the draft map has not been adopted by the Commission. The draft map does not identify Mission Boulevard as the first public road paralleling the sea in this area. Instead, it shows an un-named alley, one-half block west of Mission Boulevard on page 23 of 44 of said map.

The applicant in effect asserts that the Commission is bound by the appeal jurisdiction delineated on the draft post certification map. However, the map is not final and has not been adopted by the Commission. Draft maps do not establish the Commission’s jurisdictional boundaries. Therefore, the Commission’s delineation of a first public road that is different from the one shown on the draft post-certification map is not an “abandonment of the jurisdictional limits” set forth in the map. Further, nothing in the Commission’s regulations requires that it hold a hearing or notify the public of changes to a draft post-certification map. Finally, even if the draft map were a final, adopted map, the Commission’s appeal jurisdiction is based upon the statutory criteria set forth in Coastal Act section 30603. The maps are intended to reflect these criteria but they are not determinative of the Commission’s jurisdiction. In fact, the Commission’s regulations require that each post-certification map contain the following statement: “This plat may be updated as appropriate and may not include all lands where permit and appeal jurisdiction is retained by the Commission.” Thus, even adopted post-certification maps do not limit the Commission’s appeal jurisdiction if they do not accurately reflect the appealable areas identified in section 30603 of the Coastal Act.

Therefore, based on the above information, the Commission reaffirms its earlier determination that Mission Boulevard as defined by Section 13577(i)(E) of the Commission’s Code of Regulations is the first public road paralleling the sea in this location. In addition, the Commission finds that although the “Draft Post-Certified Appellate Jurisdiction Map” for the City of San Diego does not identify Mission Boulevard as the first public road paralleling the sea, the map is in draft form and does not limit the Commission’s appeal jurisdiction, and therefore, no error of law or fact has occurred.

In the review of coastal development permit application for another project in this same vicinity (and involving the same applicant) in 2001, Boundary Determination (BD 23-2001) was performed by the Commission’s Technical Services Unit which made a written

determination for the file record of this mapping error for this vicinity of Pacific Beach. That boundary determination clearly shows Mission Boulevard as the first public road paralleling the sea and the area seaward of Mission Boulevard as appealable, including the subject site. Since that time, whenever the Commission's San Diego District Office staff has received inquiries regarding the jurisdiction in this area of Pacific Beach, these project sites are reviewed on a case-by-case basis and a letter is written to confirm that the site is located within the Commission's area of appeal jurisdiction. In addition, it should be noted that the subject development was noticed by the City as an appealable development throughout its review, up to and including the Planning Commission hearing where the project was approved by the City. Currently, the technical services unit will attempt to prioritize the corrections to this page of the post-certification maps in the near future to resolve jurisdiction questions in this area until the entire post-certification maps are updated/finalized.

Staff Recommendation On Substantial Issue.

The staff recommends the Commission reject the following motion and thereby adopt the following resolution:

MOTION: *I move that the Commission determine that Appeal No. A-6-PCB-04-16 raises NO substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.*

STAFF RECOMMENDATION:

Staff recommends a **NO** vote. Failure of this motion will result in a de novo hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of the majority of the appointed Commissioners present.

RESOLUTION TO FIND SUBSTANTIAL ISSUE:

The Commission hereby finds that Appeal No. **A-6-PCB-04-16** presents a substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the Certified Local Coastal Plan and the public access policies of the Coastal Act.

Findings and Declarations.

1. Project Description/Permit History. The proposed project involves the demolition of an existing 24-unit motel and two single-family residences and the construction of a mixed-use development consisting of 17 residential dwelling units (condominiums)

totaling 39,137 sq.ft. and four retail/commercial leaseholds totaling 2,891 sq.ft. on an approximately .5 acre site. The proposed development consists of four three-story structures (Building Nos. 1-4). Building No. 4 fronts on Mission Boulevard and contains four retail/commercial leaseholds at the ground level with four residential units (2, two-bedroom units and two 3-bedroom units) on the upper two levels. Building No. 3 is situated immediately west of Building No. 4 and includes five, 2-bedroom residential units on the second and third floors over parking for residential units on the ground floor (which also includes a small entry area for the residential units located above). Building Nos. 1 and 2 are located at the west side of the property and each include four, 4-bedroom residential units. A total of 43 parking spaces are proposed to serve the proposed development. The site is located at the southwest corner of Mission Boulevard and Diamond Street in Pacific Beach, one block from the ocean. In this area, Mission Boulevard is the first public road. Thus, the proposed development is located between the first public road and the sea.

2. Visitor-Serving Use Priority. The front or eastern half of the site along Mission Boulevard is zoned C-V-1-2 (Commercial-Visitor) and the western portion is zoned residential. According to the certified Pacific Beach Land Use Plan, the entire site is designated Visitor Commercial. Specifically, all the properties west of Mission Boulevard to the ocean are designated for visitor commercial uses. As noted above, the proposed project would remove a 24-unit motel and two single-family residences and replace them with 17 dwelling units. In addition, 2,891 sq.ft. of retail/commercial space is also proposed along Mission Boulevard at the ground level, with residential development (four units) on the upper levels (Building No. 4). A second building (Building No. 3) that is located entirely within the portion of the site that is zoned C-V-1-2 is proposed to contain residential use only (five units). The remainder of the site that is zoned residential will contain 8 additional residential units.

The certified LUP contains a policy that states:

Specific commercial areas in Pacific Beach shall be designated for office, regional, community, neighborhood and visitor-serving commercial uses (see Figure 11).

Figure 11 (ref. Exhibit No. 6) shows the entire area west of Mission Boulevard between Pacific Beach Drive and Chalcedony Street as designated for Visitor Commercial use. This area includes the project site.

In addition, the certified Pacific Beach Land Use Plan also contains the following policy:

Designate the Mission Boulevard commercial area for visitor-serving commercial areas. Apply a commercial zone to Mission Boulevard that will meet a variety of needs for existing and future resident and visitor populations. An emphasis shall be placed on meeting the unique needs of destination visitors (tourists) who often initially access the beach area with automobiles. Promote destination parking at hotels and motels, with pedestrian-friendly visitor uses and activities nearby. North of Diamond Street, limit uses to multi-family

residential and hotels and motels, some with ancillary on-site commercial uses such as recreational and health facilities, beauty shops, snack bars and dry cleaners. [p. 44]

The certified Land Development Code states the following regarding the C-V-1-2 Zone:

Section 131.0505 - Purpose of the CV (Commercial-Visitor) Zones

- (a) The purpose of the CV zones is to provide area for establishments catering to the lodging, dining, and recreational needs of both tourists and the local population. The CV zones are intended for areas located near employment centers and areas with recreational rezones or other visitor attractions.
- (b) The CV zones are differentiated based on development size and orientation as follows:
 - CV-1-1 allows a mix of large-scale, visitor-serving uses and residential uses
 - CV-1-2 allows a mix of visitor-serving uses and residential uses with a pedestrian orientation

With regard to residential uses in this zone, the LDC contains the following footnote:

² Residential use and residential parking are permitted only as part of a mixed-use (commercial/residential) project. Non-owner occupants must reside on the premises for a minimum of 7 consecutive calendar days. Within the Coastal Overlay Zone, residential uses and instructional studios are not permitted on the ground floor. [Emphasis added]

As noted above, the purpose of these provisions is to promote commercial uses that cater to visitors to the community, which often include coastal tourists. Given the proximity of the site to the ocean (one block away) it is important to retain visitor-commercial uses to accommodate coastal visitors in this nearshore area. The certified LUP encourages the retention of these types of uses, consistent with the C-V-1-2 zone. Furthermore, residential uses are not permitted on the ground floor in the CV zone. Although Building #4 which fronts on Mission Boulevard contains retail/commercial on the ground floor with residential above, Building #3 located directly west of Building #4 (within the C-V-1-2 zone portion of the site) consists entirely of residential use, inconsistent with the LCP provisions cited above. Although Building #3 is proposed to have residential uses on the upper two floors over ground-level parking, the ground floor, at a minimum—should have been reserved for commercial/retail use consistent with the certified Land Use Plan.

It should also be noted that the reservation of adequate land for visitor-serving uses in the nearshore areas has been an issue in the Pacific Beach community for some time and was specifically addressed by the Commission in 1995. The staff report for the certification of the Pacific Beach Community Plan (LCPA #2-95C) in 1995, stated:

In the resubmitted plan, all the designated area south of Diamond Street, and the properties north of Diamond Street fronting directly on Mission Boulevard or located between the ocean and first alleyway will be implemented with the CV Zone, with visitor-serving uses the highest priority. ...In its 1984 certification of the Pacific Beach Land Use Plan (dated 1983) the Commission found that the first priority in both these areas (Mission Boulevard corridor and East Mission Bay Drive) should be assigned to tourist-oriented uses, since these corridors are the main accessways to the ocean and Mission Bay Park. ...South of Diamond Street, all properties fronting on, or west of, Mission Boulevard are designated Visitor-Serving and will be implemented through the CV zone....

...The CV Zone allows for all usual visitor facilities, while prohibiting non-visitor-related uses on the ground floor of all new development. This serves to maintain a streetscape friendly and accessible to persons otherwise unfamiliar with an area. The Mission Boulevard corridor is used by both residents and visitors, but, other than during commuter hours, largely for recreational purposes. Thus, the goods and services needed by visitors from out of town/state/country are also the goods and service desired by many locals availing themselves of the beaches and other recreational amenities nearby.

Prior to adoption of the LCP for this area, several areas along Mission Boulevard remained areas of deferred certification due to the issues addressing adequacy of visitor-serving commercial uses. In adopting the Pacific Beach LUP and the subsequent Land Development Code (Implementing Ordinances), the Commission required that visitor commercial areas should be a priority use along the Mission Boulevard corridor south of Diamond Street. Areas north of Diamond Street, as addressed above, were allowed to have interior properties (not fronting on Mission Blvd.) zoned RV (Recreation Visitor) to address the mid-block portions of Mission Boulevard north of Diamond Street. Several of those properties were already developed with multi-family residential units. The City and Commission specifically identified the importance of Mission Boulevard as being a major coastal access corridor for visitor-serving uses and thus designated the entire Mission Boulevard area as Visitor Commercial. However, this area was approved to be implemented under two different zones—the CV and RV zones. The CV zone was applied exclusively to all commercial properties between the ocean and Mission Boulevard south of Diamond. In addition, for those properties north of Diamond Street that did not front directly on Mission Boulevard and which were identified as being less likely to attract the tourist trade, were zoned RV. The RV zone allows visitor types of uses and could be redeveloped in the future with another form of visitor accommodation such as short- and longer-term rental opportunities as well as additional visitor-serving lodging. Through the rezoning of this corridor to CV and portions north of Diamond Street to RV, the Commission was able to approve the proposed rezones and found them adequate to implement the certified LUP which resulted in effective certification of this deferred area.

In this particular case, based on the above discussion, the entire subject site should have been zoned CV as it is located both south of Diamond Street and west of Mission

Boulevard, which is identified as the area where tourist-oriented uses should be given top priority. However, only one-half of the subject site is zoned C-V-1-2, which restricts residential development to upper floors only, reserving the ground floor for priority visitor-serving uses, with the other half zoned for residential uses. It is not clear why the entire site was not zoned CV, but it probably is because the interior one-half of the lot contains existing residential development and the City did not want to create a non-conforming use. In any case, this only further supports the concern that all development on the CV zoned portion of the site should provide tourist commercial uses consistent with the C-V-1-2 Zone. Another viable option, should demolition of the residential units occur, would be to rezone the entire site to CV consistent with the certified LUP designation of Visitor Commercial.

However, the development, as approved by the City, allows development of an entire structure (Building #3) with residential uses (5 residential units over covered residential parking) within the C-V-1-2 Zone with no requirement that the ground floor be reserved for commercial use - which is in direct contradiction to the above cited LCP provisions. Thus, as approved by the City, the proposed development represents a predominantly residential development (over three-fourths of the site is proposed for residential use) in an area where the certified LCP calls for tourist commercial uses to be given highest priority. One alternative to address this concern would be to extend the commercial use on the ground floor west down Diamond Street, thereby affording the additional commercial use street frontage, with residential use on the floors above.

Therefore, the appellants have raised a substantial issue regarding the conformity of the development with the policies of the certified LCP. Furthermore, approval of the proposed project would set an adverse precedent for other similar development in the area and therefore raises a substantial issue.

3. Lower Cost Visitor and Recreational Facilities. As noted previously, the subject site is located between the first public road (Mission Boulevard) and the Pacific Ocean. Thus, the grounds for appeal are consistency with the certified LCP and the public access policies of the Coastal Act. A second way in which these and related issues are relevant to the appeal and are raised by the proposed development is with regard to the Coastal Act policies regarding protection of lower cost visitor and recreational facilities. Specifically, Section 30213 of the Coastal Act state the following:

Section 30213

Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred.

The public access and recreation policies of the Coastal Act call for protection of public access and recreation opportunities as well as lower cost visitor and recreational facilities. In reliance on these policies, the certified LUP has a policy that states:

Recreation and Visitor Serving Facilities.

The Commercial element recommends retaining existing commercial areas in proximity to the beach and bay with a commercial and visitor serving focus, while still providing community good and services. [p. 22]

Given that the proposed development results in the removal of a 24-unit motel in an area specifically designated for commercial-visitor uses, this could impact the supply of existing lower-cost visitor-serving accommodations in the nearshore area. Hotels and motels represent high-priority tourist facilities. The City did not conduct any studies with regard to the existing reservoir of visitor-serving hotel/motel accommodations in the nearshore community including supply vs. demand, etc. or make any findings on this issue. Whether or not the motel provides low-cost accommodations would depend on its current rates and the number of similar establishments in the immediate area. Absent any studies conducted by the City that assesses this information, this determination cannot be made.

This is an issue that the Coastal Commission has addressed in the past--most recently, in the San Diego area, LCPA#1-01 for construction of a resort (i.e., hotel and timeshare development) near the Oceanside Pier. In that LCP amendment, the City of Oceanside provided detailed information to address whether or not sufficient lower cost overnight accommodations were already provided for in the project area through submittal of an inventory of low to moderate cost accommodations in Oceanside's downtown area. The inventory provided a list of the largest summer rental units that are available within the coastal zone and included 489 hotel/motel units, their average daily rate and average maximum rate. The analysis included the availability of the units from season to season, etc.

As noted earlier, this type of information has not been provided for the subject project. Thus, in this particular case, the removal of existing 24-unit motel without documentation that its removal will not result in an impact to the supply of low cost visitor and recreational facilities may not meet the requirements of the public access policies of the Coastal Act, as well as the related LCP policies, and therefore, raises a substantial issue.